IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-333

UNITED AIR LINES, INC.,

Petitioner,

versus

CAROLYN J. EVANS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF DELTA AIR LINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., AND TRANS WORLD AIRLINES, INC., AS AMICI CURIAE

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TO: THE SUPREME COURT OF THE UNITED STATES.

COME NOW DELTA AIR LINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., AND TRANS WORLD AIRLINES, INC., hereinafter referred to as "*Amici* Airlines," and pursuant to Rule 42(3) of this Court, hereby respectfully move for an order granting leave to file the attached brief *amici curiae* on behalf of Petitioner, United Air Lines, Inc. Written con-

sent to the filing of such brief has been requested of both parties, and granted by petitioner, but refused by respondent.

APPLICANTS' INTEREST

1. Applicants are major domestic and international U.S. airlines with thousands of employees in the airline industry throughout their route systems which cover all geographic regions of the United States. The validity and ongoing efficacy of their seniority systems and the reasonable expectations of the vast majority of their employees who stand to lose seniority will be dramatically affected if there is an adverse result in this case.

2. *Amici* Airlines have been and are currently parties defendant in litigation in lower federal courts throughout the country in cases which have raised new and important questions concerning the validity of seniority systems and the existence of or non-existence of affirmative duties under Title VII. *See, e.g. Cates v. Trans World Airlines, Inc.*, 13 FEP Cases 201 (S.D.N.Y. 1976); *Stroud v. Delta Air Lines, Inc.*, 392 F. Supp. 1184 (N.D. Ga. 1975), *judgment for defendant*, Civil No. C-74-5A (N.D. Ga. March 31, 1976), *appeal docketed*, No. 76-2130, 5th Cir., May 21, 1976; *James v. Delta Air Lines, Inc.*, Civil No. C74-1676A (N.D. Ga. March 10, 1976), *appeal docketed*, No. 76-2581, 5th Cir., May 20, 1976; and *Flannigan v. Trans World Airlines, Inc.*, Civil No. 76-1113F (C.D. Cal., complaint filed April 6, 1974); *EEOC v. Delta Air Lines, Inc.*, Civil No. C76-906A (N.D. Ga., complaint filed May 24, 1976); *Kennan v. Pan American World Airways, Inc.*, Civil

No. 76-1245WHO (N.D. Cal.); *Fyfe v. Pan American World Airways, Inc.*, Civil No. 76-1273WHO (N.D. Cal.)

The actions in which *Amici* Airlines are parties involve the same general issues but in the instance of one of *Amici* the presence of a factual variation served to highlight the erroneous nature of the lower court's holding. Pan American granted seniority credit for the period of previous employment to former flight attendants whose prior terminations were allegedly discriminatory and who were later rehired. *Amici* desire to demonstrate that such a total time-in-service seniority treatment would not be valid if Respondent's theory is accepted.

3. *Amici* Airlines have been uniquely affected by judicial interpretations of Title VII which have caused the radical alteration of long standing employment practices such as the one which forms the underlying basis of this action and have a vital interest in the determination of whether the former existence of those policies, standing alone, imposes new and unforeseen duties and liabilities under Title VII. *See, e.g., Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

QUESTIONS OF FACT AND LAW WHICH HAVE NOT BEEN AND PROBABLY WILL NOT BE ADEQUATELY PRESENTED BY THE PARTIES

Amici Airlines believe that the following questions of fact and law have not been, and there is reason to

believe they will not be, adequately presented in the briefs of the parties:

1. Whether the issue is at present properly framed so as to reflect the real question before this Court, to-wit: whether Title VII imposes an affirmative duty on an employer to reinstate an employee whose discriminatory termination claim is time barred to her former position in a seniority system when the *bona fides* of that system is not under attack.

2. Whether the Court below erred in determining that the issue in this case centers around the provisions of § 703(h) of the Act when the plaintiff is not seeking the abolition or alteration of a neutral seniority system but instead affirms that system and seeks the advantages it affords.

3. Whether the Court below recognized that the Respondent was not complaining of a current affirmative policy which the Petitioner has but is, *in fact*, complaining of a policy Petitioner *does not have*.

4. Whether the failure of an employer to voluntarily grant the Title VII relief which a federal court is without jurisdiction to order gives rise to a new cause of action which would allow a federal court to grant such relief.

For the foregoing reasons, it is respectfully requested that this Court grant *Amici* Airlines leave to file a brief as *amici curiae*.

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SUMMARY OF ARGUMENT

A proper resolution of the issue in this case requires first that this Court recognize what is *not* an issue in this case. *Amici* respectfully submit that the Seventh Circuit erroneously determined that the *bona fides* of United's seniority system is the determinative factor in whether Respondent is entitled to relief. The *bona fides* of that system is not at issue in this case because Respondent is not complaining of a current policy which United *has*, but is instead complaining, *in fact*, about a policy which United *does not have*. The true issue in this case is whether an employer has an affirmative and continuing duty under Title VII to "reinstate" a person terminated because of alleged dis-

crimination to her former position in the seniority roster, even though that employee never filed a timely charge with the EEOC and her Title VII claim is time-barred.

The *bona fides* of United's seniority system has not been challenged by the Respondent. She does not seek to have that system abolished or altered. Her only real claim is the time-barred one arising out of her 1968 resignation. Respondent's theory attempts to resurrect this old claim by asserting that United has a continuing duty to voluntarily provide her with a remedy that no court has jurisdiction to order, and that United's failure to fulfill this "duty" is itself a violation of Title VII. Unless Respondent's theory is recognized for what it is, the important time limitations questions in this case cannot be properly resolved.

There is no affirmative duty under Title VII to "reinstate" an individual whose prior termination may have been discriminatory, and the later re-employment of that individual does not alter this fact. "Reinstatement" is a much broader concept than mere "rehire" and assumes that for certain purposes, such as seniority status, the employee was never away. There is no logical reason to distinguish between an instance wherein "reinstatement" is demanded by a current employee and the situation wherein "reinstatement" is demanded by someone who is not a current employee. "Policies" of employers which consist solely of the *failure to have a policy* of compensating, reinstating, or otherwise remedying injuries alleged to have occurred outside of the applicable limitation period simply do not constitute continuing violations of the Act.

Adoption of the Seventh Circuit's ruling in this case would have the effect of repealing the time limits contained in Title VII. Numerous courts have recognized that the failure to voluntarily grant a possible Title VII remedy is not the type of "policy" which can support a continuing violation claim. Analogous cases arising out of the National Labor Relations Act support the absence of such a continuing duty. The basic fault with Respondent's theory is that it has no logical limitation short of repeal of the Title VII time limits. No violation would be conceivable that would not be continuing.

Though its position appears to have changed, even the EEOC has in the past acknowledged the importance of the difference between a continuing act or practice and the lingering effects of a completed act or practice. Prior EEOC interpretations have indicated that such matters as discriminatory layoffs, transfers, and discontinuances of work assignments do not constitute continuing violations. Any later inconsistent EEOC interpretation of the Act must be viewed in light of these earlier pronouncements.

This Court's opinion in the case of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), does not stand for the proposition that every employment system which has some tangential relationship to a prior act of discrimination is invalid. The failure of an employer to voluntarily institute programs granting special treatment to possible victims of past discrimination is not a violation of Title VII and *Griggs* did not so hold. The types of policies held illegal in *Griggs* are affirmative policies which operate as barriers to deny job

opportunities to victims of past discrimination. There is no such policy in this case.

Finally, this Court's holding in *Franks v. Bowman Transportation Co.*, ___ U.S. ___, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), does not compel a contrary result. This Court held in that case that a grant of retroactive seniority within an existing system is a permissible remedy in a timely-filed suit wherein discriminatory hiring is proved. *Franks did not* hold that an employer's failure to grant voluntarily such a remedy was itself a violation of Title VII. Indeed, this Court specifically denied such a proposition.

ARGUMENT

I.

Introduction

In November of 1966, the Respondent, Ms. Evans was first hired as a flight attendant at United Airlines.

In 1968 United maintained a policy whereby it did not allow its flight attendants to be married.

In February of 1968, Ms. Evans resigned her position as a flight attendant to be married. She filed no charge of sex discrimination with the Equal Employment Opportunity Commission within 90 days of this event.

In November of 1968, United abandoned its "no marriage" policy. Ms. Evans did not file a charge of sex discrimination within 90 days of this event.

In February of 1972, Ms. Evans was hired as a new employee at United. Her place on the seniority roster was set as of this date of hiring. She did not file a charge of sex discrimination with the EEOC within 180 days of this event.

In February of 1973, five years after her resignation and over four years after United had abandoned its no-marriage policy, Ms. Evans filed a charge of sex discrimination with the EEOC claiming United had violated Title VII of the 1964 Civil Rights Act by failing to restore her original 1966 seniority date.

> Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-349, 88 L.Ed. 788, 792, 64 S.Ct. 582. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.

Burnett v. New York Central R.R., 380 U.S. 424, 428 (1965). This case does not involve an attack on a seniority system, but instead involves an attack on these fundamental principles of fairness underlying a set of Congressionally mandated time limits.

II.

A Correct Determination Of The True Issue Is Essential To A Proper Resolution Of This Case.

Amici Airlines respectfully submit that the Seventh Circuit Court of Appeals erred in its reversal of the Trial Court's dismissal of Respondent's action. The Court of Appeals misapprehended the true issue in this case when it stated:

> The issue is whether section 2000e-2(h) [§ 703(h)[1]] may be used to interpose a legal bar to Evans' theory that the perpetuation of past discrimination through United's current seniority policy constitutes a continuing violation of her Title VII rights.

534 F.2d at 1250. *Amici* submit that neither § 703(h) nor the validity of United's current seniority system have anything to do with this case. *No current policy of United Airlines is being challenged in this case. Respondent is complaining, IN FACT, about a policy which United Airlines DOES NOT HAVE.* The real issue is whether Title VII requires an employer to affirmatively "reinstate" a former employee whose

1 Section 703(h) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(h) (1970), provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

prior resignation was the result of alleged discrimination even though that employee never filed timely charges with the EEOC concerning her resignation and her Title VII claims are barred. *Amici* respectfully submit that a correct reading of Title VII reveals that no such duty exists.

A. *The Legality Or "Bona Fides" Of United's Neutral Seniority System Is Not At Issue In This Case Because The Respondent Has Not Challenged The Underlying Principle Of The System But Is Merely Seeking Reinstatement To Her Former Position Within That System.*

The Respondent in this case does not challenge the underlying principle of a seniority system.[2] She concedes that United's seniority system operates in a facially neutral manner. She does not seek to have it abolished or altered as a system. Respondent merely seeks a position within that system, which position was lost, not because of any *current* operation of the system or practice of United, but solely by reason of her 1968 resignation which she claims to have been the result of sex discrimination.[3] Instead of complaining about a policy that United currently applies, Respon-

2 For cases in which the seniority system was in fact challenged, see note 17 *infra*.

3 Of course, Ms. Evans would not have a case under any theory unless Sprogis v. United Air Lines, Inc. 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), is good law. This Court has never addressed some of the interesting issues raised by that case. *See id.* at 1202 (Stevens, J., dissenting). Those issues are not properly before this Court at the motion to dismiss stage because they go to the merits of Ms. Evans' claim and this Court must first determine whether the trial court has jurisdiction to hear that claim.

dent in reality is complaining about an *additional* policy that United does *not* have — a policy of automatically reinstating to their former seniority positions the possible victims of alleged prior discrimination. Judge Cummings in his original dissent recognized exactly this fact:

> The gravamen of the complaint is that United has continued to fail to credit plaintiff with prior seniority.

Evans v. United Air Lines, Inc., 12 FEP Cases 288, 291 (7th Cir. Jan. 29, 1976). Respondent does not seek to have United abandon its current policy, but instead seeks to force United to adopt this *additional* policy. Therefore, whether § 703(h) protects neutral seniority systems is irrelevant to this case because Respondent is simply not attacking the existing system.

The lower court's opinion confused the issue further by comparing continuous time-in-service seniority systems with total time-in-service systems, as if this were the basis of the controversy in this case.[4] 534 F.2d at 1250. Respondent's claim, however, would be satisfied under neither system. What Respondent seeks is the reinstatement of her November 1966 seniority date. A shift to a total time-in-service system would not give her this. She is seeking not only the

4 It is clear that Ms. Evans is seeking reinstatement of her original 1966 seniority date. 534 F.2d at 1248. Indeed this reinstatement request formed the basis for Judge Cummings' dissent from the first opinion in the Court of Appeals. He stated:

> This is a current practice of defendant and results in plaintiff's receiving less seniority than male stewards hired between her February 1968 illegally forced resignation and her February 1972 reemployment.

12 FEP Cases 288, 291 (7th Cir. Jan. 29, 1976).

seniority she accrued while she actually worked for United but also the seniority she claims she would have accrued from her resignation in 1968 until she returned to work.[4.1] She lost both her original seniority date and the continuity of her time-in-service in February 1968 when she resigned. *Five years later* she commenced these proceedings, not in order to alter or abolish United's current seniority system, but to obtain a stepped-up position in it.

B. Recognition That Respondent's Claim Turns On Whether Title VII Imposes An Affirmative Duty To Reinstate Victims Of Prior Discrimination Is Essential To The Resolution Of The Important Time Limitations Questions In This Case.

The timely filing of a charge with the EEOC is a jurisdictional prerequisite to the subsequent maintenance of an action based on Title VII. *E.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 359 (7th Cir. 1968). In 1968, when Respondent resigned, the law required that the EEOC charge be filed within

4.1 In fact, one of *Amici*, provides total time-in-service treatment to former flight attendants whose prior terminations were allegedly discriminatory. This practice is currently being challenged in lower federal courts under the same theory that Respondent's present here. *See* Applicant's Interest *supra*. Under Respondent's theory, a total time-in-service policy would also be subject to attack because it would not give Ms. Evans credit for the period between 1968 and 1972 when she did not work for United. Moreover, such a policy would give no credit to the new employee who, although he never worked for his employer previously, claims that this prior non-employment was due to an act or acts of alleged discrimination about which he never filed a charge.

90 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(d) (1970), as *amended*, 42 U.S.C. § 2000e-5(e) (Supp. II 1973)[5] (extending time limit to 180 days). Respondent, however, waited until five years after she lost her position and four years after United had discontinued its no-marriage policy before she filed her charge with the EEOC. *Therefore, whether her case is based on the resignation in 1968 or on the policy abandoned that same year it is clearly time-barred.* Consequently, whether Respondent has a valid claim under Title VII depends entirely upon whether some *current* United policy violates Title VII, as she apparently concedes. 534 F.2d at 1249.

As discussed above, Respondent is not challenging United seniority system. Instead, she wishes to be reinstated to her former position within it. Therefore, the only current "policy" of United which Respondent is challenging here is United's *failure to have a policy* of reinstating the possible victims of alleged past discrimination to their former positions. That Ms. Evans' claim is in fact a "reinstatement" one is made clear by the following hypothetical. Suppose another former

5 Section 706(e) of Title VII, as amended by § 4(a) of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 200e-5(e), provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice . . . such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

United flight attendant resigned because of the now abandoned policy in 1968 and likewise failed to file a timely charge with the EEOC. Today, she approaches United, not requesting to be hired, but demanding to be reinstated in her former position with a seniority date running from the time she was *first* hired. Would United have a duty under Title VII to so reinstate her? Only if such a duty exists does Ms. Evans have a claim. *There is no reason to distinguish between an instance wherein "reinstatement" is demanded by a current employee and the situation wherein "reinstatement" is demanded by someone who is not a current employee.*[6]

Under Title VII United had a duty to consider Ms. Evans' application for employment in 1972 on its merits and not discriminate against her on the basis of one of the proscribed classifications under the Act. This United clearly did and Ms. Evans was hired. She was "re-hired" only in the sense that she was at one time in the past a United employee the same as if she had voluntarily left United to take other employment in 1968 and later returned. What she is now demanding is to be "reinstated" to her former position. Reinstatement is entirely different from "rehire" in this context and in effect says that for certain purposes, such as seniority, the employee was never away.

6 For example, in Kennedy v. Braniff Airways, Inc., 403 F. Supp. 707, 709 n.2 (N.D. Tex. 1975), the court stated:

> It has been suggested that the continuing violation doctrine could be limited to present employees. . . . This possible limitation would serve to distinguish many of the cases the court has cited. The ultimate question is whether the distinction warrants the vast difference in treatment requested by the plaintiffs. This court has been unable to justify the delineation except on the practical grounds that it would reduce the number of possible claims.

There is no "continuing duty to reinstate" someone who may have been discriminatorily discharged under Title VII,[7] and Ms. Evans' 1972 hiring by United does not alter this fact.

Amici Airlines submit that the fact that Respondent is seeking reinstatement within United's current system rather than the abolition or alteration of that system should be crucial to the outcome of this case. The gravamen of Respondent's complaint is that United discriminatorily dislodged her from her position in 1968 and currently refuses to reinstate her to that same position. The validity of United's current seniority system is simply not at issue.

This view of the true issue in this case clearly reveals that Respondent's continuing violation argument is groundless. As discussed in depth in the next section, a finding of a continuing violation in this case would violate the elementary principles of law underlying statutes of limitations in every field, including Title VII. "Policies" of defendants which consist solely of refusing to compensate, reinstate, make restitution, or otherwise remedy injuries alleged to have occurred outside of the applicable statute of limitations simply do not constitute continuing violations or otherwise toll the statute.

III.

Title VII Imposes No Duty On An Employer To Reinstate A Victim Of Alleged Prior Discrimination To Her Former Position Within A

7 See cases cited in Part III A *infra*.

Neutral Seniority System In The Absence Of A Timely Suit Brought On The Prior Discrimination.

Remedies are the province of the judiciary. The proving of a claim in a timely-filed suit gives the court jurisdiction to order an appropriate remedy. In this case, Respondent concedes that the court has no jurisdiction to grant the remedy she seeks ("reinstatement") if her suit is grounded either on her 1968 resignation or the policy change in 1968. 534 F.2d at 1249. However, Respondent in essence asserts that the failure of United to grant this remedy voluntarily is itself a violation of Title VII. Therefore, according to Respondent the court *does* have jurisdiction to order the remedy based on her 1968 resignation. Under Respondent's bootstrap theory, an employer's simple refusal to grant a time-barred remedy is elevated to the status of a current "policy" which perpetuates past discrimination and which consequently rejuvenates the court's jurisdiction to order the remedy after all.

A. *The Congressionally Mandated Time Limits In Section 706(e) Of Title VII Will Be Judicially Repealed If Respondent's Theory Is Adopted.*

Respondent argues that a continuing violation is present in her case and that therefore the time limits in § 706(e) do not apply so long as the challenged "policy" persists. Respondent's case does not present a continuing violation because the policy that resulted in Respondent's termination was abandoned years before a charge was filed and the only present "policy" is United's refusal to reinstate her to her former sen-

iority position which was lost by reason of her 1968 resignation. This Court is required to find that "inaction" alone is a "continuous policy" which is subject to challenge so long as the inaction persists.

In all of the leading cases in which a true continuing violation was found, the plaintiffs challenged affirmative employment policies and sought to have those policies abolished or substantially altered. Here Respondent is *not challenging* United's current seniority system but is merely seeking to obtain a higher position within that system. The essence of her grievance is that United has failed to adopt an *additional* policy, that of voluntarily granting the victims of alleged past discrimination a full remedy without requiring those persons to file suit on the original violation.

Numerous courts have recognized that this failure to grant a remedy is not the type of "policy" which can support a continuing violation claim. For example, in *Culpepper v. Reynolds Metals Co.*, 296 F. Supp. 1232 (N.D. Ga. 1969), *rev'd on other grounds*, 421 F.2d 888 (5th Cir. 1970),[8] the plaintiff claimed that the employer had illegally denied him a promotion and that this violation was continuing because the employer had not yet placed the plaintiff in his rightful position. The court rejected this claim and stated:

> There is no known authority to the effect that a *failure to rectify* an alleged unlawful act converts it into a continuing transaction or suspends the 90-day period.

8 The Fifth Circuit reversed on the ground that the plaintiff's resort to arbitration under a collective bargaining agreement tolled the statute of limitations.

296 F. Supp. at 1235 (emphasis supplied). Again, in *Collins v. United Air Lines, Inc.*, 514 F.2d 594 (9th Cir. 1975), the court was faced with a situation identical to the case at bar except that Ms. Collins had never been rehired. She attacked United's "policy" of failing to reinstate her as a continuing violation, but the court held the claim time-barred and stated:

> In this context, a request for reinstatement is wholly different from a new application for employment — it seeks to redress the original termination.

Id. at 596. In *Kennedy v. Braniff Airways, Inc.*, 403 F. Supp. 707, 709 (N.D. Tex. 1975), an employer's "refusal to restore seniority rights" was held not to be a continuing violation. Many other cases involving employment discrimination agree that such "policies" as a refusal to restore seniority rights, a failure to rectify an alleged unlawful act, or a refusal to reinstate do not constitute additional violations.[9]

It is consistent with national labor policy to have time limits on complaints arising in the employment

9 *E.g.*, Smith v. OEO for Arkansas, 538 F.2d 226 (8th Cir. 1976) (discriminatory refusal to hire not continuing); Terry v. Bridgeport Brass Co., 519 F.2d 806 (7th Cir. 1975) (refusal to accept recall which results in loss of seniority not continuing); Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975) (en banc) (failure to reinstate after termination not continuing); Griffin v. Pacific Maritime Ass'n, 478 F.2d 1118 (9th Cir.), *cert. denied*, 414 U.S. 859 (1973) (under 42 U.S.C. § 1981, layoff is not continuing); Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972) (failure to promote not continuing unless employee is discriminatorily passed over in future promotions); Cisson v. Lockheed-Georgia Co., 392 F. Supp. 1176 (N.D. Ga. 1975) (demotion not continuing); Buckingham v. United Air Lines, Inc., 11 FEP Cases 344 (C.D. Cal. 1975) (terminations and transfers not continuing).

context. Cases under § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), involve similar issues. This Court has often drawn on this source to aid in the interpretation of analogous Title VII provisions.[10] In *NLRB v. Textile Machine Works, Inc.*, 214 F.2d 929 (3d Cir. 1954), the court ruled that an employer's refusal to reinstate employees illegally fired for striking did not itself constitute a new violation. The court analyzed a demand for reinstatement as follows:

> A discharged employee who seeks to be *reinstated* is really litigating the unfairness of his original discharge because only if the original discharge was discriminatory is he entitled to be reinstated as if he had never ceased working for the employer. The word *reinstatement* must be employed in this connection as the equivalent of uninterrupted employment. In this sense, the employee is restored to all of the rights and privileges which were his before he was discharged, *plus any new rights and privileges which would have accrued to him in the meantime* . . . .

Id. at 932 (emphasis supplied). In the case at bar Respondent is seeking precisely those rights which the *Textile Works* court defined as "reinstatement" — the restoration of old rights plus additional rights that would have accrued had she not resigned. *See also, NLRB v. McCready and Sons, Inc.*, 482 F.2d 872, 874-75 (6th Cir. 1973); and *American Federation of Grain Millers v. NLRB*, 197 F.2d 451 (5th Cir. 1952).

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10 *E.g.*, Franks v. Bowman Transportation Co., ___ U.S. ___, 96 S. Ct. 1251, 47 L. Ed. 2d 444, 464 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 419-21 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803-04 (1973).

The question of whether a prior unfair labor practice so taints a current neutral practice as to render it unlawful was addressed by this Court in *Machinists Local 1424 v. NLRB*, 362 U.S. 411 (1960). There, this Court analyzed the two possible uses of a time-barred unfair labor practice to prove a current violation:

> The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

Id. at 416-17. It was the second use that this Court refused to permit.

In the case of *NLRB v. Childs Co.*, 195 F.2d 617 (2d Cir. 1952), an employee who was terminated illegally but who failed to file a timely charge with the NLRB demanded reinstatement to his position with back seniority. The court held that his claim was time-barred even though his demand for reinstatement had been made and refused within the limitation period. The court stated regarding the employee's demand:

> It conclusively shows that he was at all times seeking reinstatement to his former rights and not merely new employment. As we have already said, restoration to these rights was barred by failure to file his charge in time and therefore the Company was not required to accede to his demand.

Id. at 621. The plaintiff in *Childs* occupied precisely the same position as Ms. Evans does in this case, except that Ms. Evans accepted reemployment with United before bringing her claim for "reinstatement."

The distinctions that these cases on continuing violations make between a plaintiff's attack on current, affirmative employment policies on the one hand and a complaint based on the simple failure of an employer to erase the effects of a past act on the other is crucial if the time limits contained in § 706(e) are to be given any effect.

The court below, in its original opinion[11] delivered in this case prior to rehearing, recognized that the adoption of Respondent's theory would result in undermining the policies expressed in § 706(e). The court quoted[12] from *Collins v. United Air Lines, Inc.*, 514 F.2d

11 12 FEP Cases 288 (7th Cir. Jan. 29, 1976).
12 *Id.* at 290.

594, 596 (9th Cir. 1975), a *case identical with Evans except for the fact that Ms. Collins, unlike Ms. Evans, was never rehired:*

> We cannot accept Collins' argument that her continuing nonemployment as a stewardess resulting from the alleged unlawful practice is itself a violation of the Act. Under the statute, *it is the alleged unlawful act or practice — not merely its effects* — which must have occurred within the 90 days preceding the filing of charges before the EEOC. Were we to hold otherwise, we would undermine the significance of the Congressionally mandated 90-day limitation period.

(Emphasis supplied). Other courts dealing with alleged continuing violations have recognized this as well. *E.g., Terry v. Bridgeport Brass Co.*, 519 F.2d 806, 808 (7th Cir. 1975); *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1234 (8th Cir. 1975) (en banc); *Kennedy v. Braniff Airways, Inc.*, 403 F. Supp. 707, 709 (N.D. Tex. 1975).

There is simply no logical limit to Respondent's theory short of judicial repeal of § 706(e). All violations would be continuing. An illegal termination, as in *Collins*, could not qualify as a completed act under Respondent's theory. In such a case, the complaining individual could simply attack the employer's current "policy" of failing to reinstate her to her former position. The fact that Ms. Evans was rehired and Ms. Collins was not should make no difference.[13]

13 See note 6 and accompanying text *supra*.

Although the EEOC's position appears to change on these matters,[14] it has in the past acknowledged the importance of the difference between a continuing act or practice and the tangential effects of a completed act or practice. In a General Council Opinion Letter dated January 11, 1966, the EEOC stated:

> A layoff is not a continuing act and, accordingly, a charge alleging a discriminatory layoff must be filed within 90 days of the layoff . . . The fact that some aspects of the employment relationship, such as recall rights, may continue beyond the date of the layoff is immaterial.

EEOC, Office of the General Counsel, Digest of Legal Interpretations Issued or Adopted by the Commission (January 1, 1966 through March 31, 1966), page 9. Similar rulings were made with regard to discriminatory transfer and discriminatory discontinuance of work assignment. *EEOC, Office of the General Council, Digest of Legal Interpretations Issued or Adopted by the Commission*, (October 9, 1965 through December 31, 1965), page 22. These interpretations of the Commission are entitled to weight in this Court's consideration of this case, and later, contrary positions should be viewed in light of these earlier

14 The EEOC found Ms. Evans' charge to be timely filed. 12 FEP Cases at 292. Apparently EEOC now takes the position that an affirmative duty to reinstate does exist. For example in a suit recently filed against one of *Amici* Airlines the EEOC has alleged violation of the Act as follows:

> (d) failing and refusing to reinstate females discharged due to marriage because of their sex;
> (e) failing and refusing to reinstate females discharged due to pregnancy because of their sex; . . .

EEOC v. Delta Air Lines, Inc., Civil No. C76-906A (N.D. Ga., Complaint filed May 24, 1976).

pronouncements. *General Electric Co. v. Gilbert*, ___ U.S. ___, 45 U.S.L.W. 4031, 4036 (U.S. Dec. 7, 1976).

Acceptance of Respondent's and the EEOC's theory of a continuing duty to rectify any past discrimination requires the judicial repeal of § 706(e) of the Act. Only if this Court is willing to ignore the Congressional purpose[15] underlying that section is such a result possible.

B. *There Is No Employment Policy In This Case Which Illegally Perpetuates The Effects Of Past Discrimination.*

The Court of Appeals characterized United's seniority policy as "an instrument that extends the impact of past discrimination, albeit unintentionally." 534 F.2d at 1250. Consequently, relying on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the court ruled that United's current seniority system itself violates Title VII, thereby rendering Respondent's claim timely.

15 This purpose was described by the Court in Cisson v. Lockheed-Georgia Co., 392 F. Supp. 1176, 1182 (N.D. Ga. 1975), as follows:

> [W]hen over-liberal interpretations of EEOC complaints would actually frustrate the intent of Title VII, such interpretations should be rejected. Thus, this court rejects the argument espoused by plaintiff herein that whenever the term "continuing" is inserted in an EEOC complaint, the court and the EEOC should assume that the plaintiff actually desires to raise claims of discriminatory failure to rehire, repromote, or retransfer, rather than the discharge or demotion claim actually asserted. Such a rule would permit the bypass of orderly EEOC procedures whenever a layoff or discharge occurs and would completely frustrate the purpose of Title VII to foster conciliation by the parties rather than judicial confrontation.

Griggs, however, is inapposite. The testing and educational requirements struck down in *Griggs* were affirmative programs that actively perpetuated the effects of past discrimination and programs that the plaintiffs sought to abolish. *Griggs* did *not* say that every employer violates Title VII unless it voluntarily institutes affirmative programs to grant special treatment to victims of past discrimination. Indeed, § 703(j) of Title VII would appear to forbid such a result.[16]

The continuing violation cases discussed above recognize that a failure to remedy is not the same as an active system which the plaintiff seeks to abolish.[17] A

16 Section 703(j) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(j) (1970), provides in pertinent part:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

17 Of course, there can be valid challenges to seniority systems under *Griggs*. This is best illustrated by the numerous cases involving job, departmental, or line-of-progression seniority systems in which the employer adopts facially neutral rules restricting transfer from one job, department, or line-of-profression to another. Where divisions were formerly segregated, these restrictions tend to perpetuate the effects of past discrimination and might consequently be unlawful under *Griggs* in certain circumstances. *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973). These cases, however, are inapposite to Ms. Evans' case. She is not challenging the structure of United's seniority system, but is merely seeking reinstatement within it.

hypothetical will serve to illustrate how *Griggs* is in harmony with this distinction. Suppose an employee is discriminatorily denied a salary increase at one point in his career. Thereafter, he receives increases regularly without discrimination except that his salary level is always one notch below the level he would have had but for the past discriminatory act. Without more, *Griggs* does not require a finding that the employer currently violates Title VII — a simple failure to remedy will not support an action. On the other hand, if the employer were to adopt a policy which states that any employee who has ever been denied a salary increase may never again be considered for further increases, then a case under *Griggs* might be presented. The employer might be compelled to abandon this policy in that it actively continues the effects of the past discrimination into the future.

Griggs should not be extended so as to invalidate any neutral seniority system which has no provision granting special treatment to possible victims of some prior discrimination.

The most obvious defect of the seniority systems which would be left after such an extension is the total absence of any way to administer them fairly. Who would choose which individuals are entitled to extra credit? How would such a system decide which of all former employees were discriminatorily discharged nine or ten years prior to rehire and which were discharged for non-discriminatory reasons? Since one of the basic theories underlying statutes of limitations is the inability of a court to have fresh evidence from wit-

nesses whose memories have faded by the lapse of time, how could an employer be expected to make better decisions? Should the system then grant back seniority to all prior employees regardless of the reason for their terminations?

There is nothing in Title VII to require an employer and its employees to give favored treatment to former workers who were terminated for sloth, theft, or incompetence or who left one company because they thought better opportunities lay elsewhere. *Amici* urge this Court not to take such a step.

C. The Court of Appeals Erred In Ruling That This Court's Opinion In Franks v. Bowman Transportation *Compels A Contrary Result.*

In *Franks v. Bowman Transportation Co.*, ___ U.S. ___, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976), this Court held that a grant of retroactive seniority was a permissible *remedy* in a timely-filed suit alleging discriminatory hiring. *Franks* did *not* hold that an employer's failure to grant voluntarily such a remedy was itself a violation of Title VII. Indeed, the Court specifically denied this proposition:

> The underlying legal wrong affecting them [plaintiffs] is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system. Petitioners do not ask modification or elimination of the existing seniority system, but only an award of the seniority status they

> would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire.

47 L. Ed. 2d at 458.

Ms. Evans likewise does not ask for "modification or elimination of the existing seniority system" but only for reinstatement to her former status within it. As the *Franks* opinion indicates, the underlying alleged legal wrong is not United's current system, but is Ms. Evans' resignation in 1968.

This Court in *Franks* did not address itself to the *bona fides* of the seniority system in that case *because that was not an issue.* This Court simply held that § 703(h) did not bar the grant of retroactive seniority within an existing system once a timely-brought claim of hiring discrimination was presented. This Court did *not* view a discriminatory hiring practice as somehow invalidating a company's seniority system. This Court in effect affirmed the validity of Bowman Transportation Company's seniority system by placing the individual discriminatees within their rightful places in that system. Section 703(h) was examined only to see what effect, if any, it had to bar the relief of retroactive seniority after a proven act of discrimination. As the above quoted language from that case makes clear, this Court scrupulously avoided the question of whether the seniority system in effect at Bowman Transportation Company was a *bona fide* one.

Had Ms. Evans timely challenged her 1968 termination, *Franks* would stand for the proposition that § 703(h) does not bar the grant of retroactive seniority as a proper remedy. Of course, no court has jurisdiction to determine whether Ms. Evans' 1968 resignation was the result of discrimination or whether she would have resigned even without the existence of the "no-marriage" rule. The evidence underlying that crucial factual question is now eight years old, and any chance for United to fairly rebut her allegations have gone with the passage of time. A ruling which requires United to attempt to overcome this burden is patently unfair and offends even the most elementary notions of due process.

In sum, if the possible existence of a single event of post Act discrimination works to invalidate an entire seniority system, it is doubtful that there exists a valid seniority system anywhere in this country. This Court's decision in *Franks* did not even approach such a result.

CONCLUSION

For the foregoing reasons it is urged that this Court should reverse the decision of Seventh Circuit Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three true and correct copies of the above and foregoing have been served on Petitioner and Respondent by depositing same in the United States mail, postage prepaid, properly addressed this ____ day of December, 1976.

GORDON DEAN BOOTH, JR.

UNITED AIRLINES

December 13, 1976

J. Stanley Hawkins, Esquire
Troutman, Sanders, Lockerman
& Ashmore
1400 Candler Building
Atlanta, Georgia 30303

Re: United Air Lines, Inc. v. Carolyn J. Evans, Supreme Court of the United States, Case No. 76-333.

Dear Mr. Hawkins:

Pursuant to your request, United Air Lines, Inc. hereby consents to the filing of a brief *amici curiae* in the subject case by Delta Air Lines, Inc. and Trans World Airlines, Inc.

Thank you very much.

Yours very truly,

/s/ EARL G. DOLAN
Earl G. Dolan
Attorney for United Air Lines, Inc.

EGD:mf